STATE OF MICHIGAN

COURT OF APPEALS

DEBRA GROSS, by her Next Friend CLAUDIA GROSS, and CLAUDIA GROSS, Individually,

Plaintiffs-Appellants,

v

THOMAS SEBOLD & ASSOCIATES, INC.,

Defendant,

and

HUGHES PROPERTIES I, INC., HUGHES PROPERTIES LIMITED PARTNERSHIP, HUGHES PROPERTIES GROUP, L.L.C., GOLF COURSE CONSTRUCTION, INC., WOODLAND VILLA, L.L.C., BRUCE SANDERS and SANDERS ASSOCIATES OF MICHIGAN, INC.,

Defendants-Appellees

UNPUBLISHED
March 18, 2008

No. 276617
Oakland Circuit Court
LC No. 2005-070734-NO

Before: Murray, P.J., and Bandstra and Fort Hood, JJ.

PER CURIAM.

Plaintiffs appeal as of right the trial court's orders granting summary disposition to defendants Woodland Villa, L.L.C. (Woodland), Golf Course Construction, Inc. (Golf Course), Bruce Sanders (Sanders), and Sanders Associates of Michigan, Inc. (Sanders Associates)[1] and denying plaintiffs' motion to amend their complaint. We affirm.

[1] Defendants, Thomas Sebold & Associates, Hughes Properties I, Inc., Hughes Properties Limited Partnership, and Hughes Properties Group, L.L.C., are not involved in this appeal as they were previously dismissed from the cause of action.

This cause of action arises out of Debra Gross's bicycle accident on June 22, 2005. Debra was riding her bicycle on a newly constructed sidewalk running parallel to Maple Road in the city of Birmingham. As she traveled across property owned by Woodland, Debra was unable to navigate a curve and her bicycle left the sidewalk. Grading had not yet been completed around the sidewalk and as Debra attempted to re-enter it, her bicycle tire struck the edge of the concrete and she fell. Golf Course, Sanders and Sanders Associates were each involved with the construction of the allegedly hazardous sidewalk.

This Court reviews a trial court's decision regarding summary disposition pursuant to MCR 2.116(C)(10) de novo. *Dressel v Ameribank*, 468 Mich 557, 561; 664 NW2d 151 (2003). Summary disposition is proper when, upon examining the pleadings, admissions and other evidence in the light most favorable to the non-moving party, there is no genuine issue of material fact and the moving party is entitled to judgment as a matter of law. *Brown v Brown*, 478 Mich 545, 551-552; 739 NW2d 313 (2007).

Plaintiffs first allege the trial court improperly granted summary disposition to Golf Course, Sanders and Sanders Associates on the basis that plaintiffs may not recover in tort for defendants' failure to perform a contractual duty. While this Court agrees that the trial court incorrectly concluded that these defendants did not breach their duty not to create a new hazard when constructing the sidewalk, we conclude that summary disposition was appropriate in favor of these defendants because the allegedly hazardous condition was open and obvious.

Plaintiffs are correct that the trial court's reliance on *Fultz v Union-Commerce Associates*, 470 Mich 460; 683 NW2d 587 (2004), was based on an overly expansive interpretation of that case. In *Fultz*, the plaintiff brought suit after slipping and falling in an icy parking lot. *Id.* at 461. The plaintiff sued both the landowner and the snow removal contractor. *Id*. The Supreme Court held that the snow removal contractor could not be held liable for the injuries for its failure to salt or plow the parking lot because the contractor owed the plaintiff no duty. *Id*. In discussing how the lower courts should determine whether a contractor owes a duty to a third-party, the Court stated, "the threshold question is whether the defendant owed a duty to the plaintiff that is separate and distinct from the defendant's contractual obligations. If no independent duty exists, no tort action based on a contract will lie." *Id*. at 467. The Court contrasted the defendant in *Fultz* with the defendant in *Osman v Summer Green Lawn Care*, 209 Mich App 703; 532 NW2d 186 (1995), overruled on alternative grounds *Smith v Globe Life Ins Co*, 460 Mich 446; 597 NW2d 28 (1999). *Fultz, supra* at 468-469. In *Osman*, the plaintiff successfully brought suit against a snow removal service that had negligently removed snow by placing it in a location where it was able to melt and refreeze, creating a new hazard. *Osman, supra* at 704. The *Fultz* Court explained that in *Osman*:

> the defendant had breached a duty separate and distinct from its contractual duty when it created a *new* hazard by placing snow on a portion of the premises when it knew, or should have known or anticipated, that the snow would melt and freeze into ice on the abutting sidewalk, steps, and walkway, thus posing a dangerous and hazardous condition to individuals who traverse those areas. [*Fultz, supra* at 469.]

By contrast, the *Fultz* Court explained that in the case before it, "[the contractor's] failure to carry out its snow-removal duties owed to [the] defendant created no new hazard to [the]

plaintiff. Thus, [the] plaintiff alleges no duty owed to her by [the contractor] separate and distinct from its contract with defendant [landowner]." *Id*.

Here, unlike in *Fultz*, defendants Golf Course, Sanders and Sanders Associates took affirmative action in designing and installing the sidewalk on which Debra was riding her bicycle. As described by Ronald Hughes, owner of Woodland, prior to the construction of the new sidewalk there was an existing sidewalk that ran parallel to Maple Road. There is no evidence that the existing sidewalk was dangerous in any way. Golf Course, Sanders and Sanders Associates oversaw the design and construction of the new sidewalk. The sidewalk was installed and the forms were removed, resulting in a drop of approximately six to eight inches from the sidewalk to the adjacent ground. The resulting drop was apparently not corrected until after Debra's bicycle accident. Thus, by their conduct, these defendants created a new hazard, at least until the grading around the sidewalk was completed. Therefore, *Fultz* does not preclude recovery against Golf Course, Sanders and Sanders Associates.

Nonetheless, while the trial court erred in ruling that these defendants owed Debra no duty separate and distinct from their contractual obligations, summary disposition was proper on the alternate grounds that the allegedly dangerous condition of the sidewalk was open and obvious. While arguments raised below but not addressed by the trial court are generally not preserved, this Court may consider such issues where, as here, the lower court record provides all the necessary facts. *Hines v Volkswagen of America, Inc*, 265 Mich App 432, 443-444; 695 NW2d 84 (2005).

This Court has previously explained that the defense of open and obvious is available in a premises liability action, but not in a claim based on ordinary negligence. *Hiner v Mojica*, 271 Mich App 604, 615-616; 722 NW2d 914 (2006). Plaintiffs assert that their cause of action was based on a claim of ordinary negligence and not on a claim of premises liability. We disagree. Plaintiffs' claim arises out of injuries caused by an allegedly defective condition on the land, not out of an affirmative act by these defendants. The mere fact that defendants failed to adequately warn pedestrians of the condition does not transform this action into one of ordinary negligence. To the contrary, such a claim is typical in a premises liability cause of action. Therefore, the claim is one of premises liability and the defense of open and obvious is available to Golf Course, Sanders and Sanders Associates. *James v Alberts*, 464 Mich 12, 18-19; 626 NW2d 158 (2001).

At the trial level, plaintiffs conceded that Debra was a licensee. A possessor of land has a duty to warn a licensee of any hidden dangers the possessor knows of or should know of. *Stitt v Holland Abundant Life Fellowship*, 462 Mich 591, 596-597; 614 NW2d 88 (2000). However, a possessor generally owes no duty to a licensee to warn her of dangerous conditions that are open and obvious. *Pippin v Atallah*, 245 Mich App 136, 143; 626 NW2d 911 (2001). "The open and obvious danger doctrine is a defensive doctrine that attacks the duty element that a plaintiff must establish in a prima facie negligence case. Whether a danger is open and obvious depends on whether it is reasonable to expect that an average person with ordinary intelligence would have discovered the danger on casual inspection." *Teufel v Watkins*, 267 Mich App 425, 427; 705 NW2d 164 (2005) (citations omitted). However, "circumstances may arise in which an open and obvious condition is nevertheless unreasonably dangerous so as to give rise to a duty upon a premises possessor to in some manner remove or otherwise appropriately protect invitees against the danger." *Lugo v Ameritech*, 464 Mich 512, 524; 629 NW2d 384 (2001).

In the present case, an average person of ordinary intelligence should have discovered the dangerous nature of the lack of grading adjacent to the newly constructed sidewalk. According to plaintiffs' own witness, Julie Dougherty, the land adjacent to the sidewalk was six to eight inches lower than the sidewalk. Debra rode her bike on the same stretch of sidewalk earlier in the day, so she had more than one opportunity to notice the height discrepancy between the sidewalk and the adjacent ground. Most telling, however, is Debra's own testimony. She testified that she was riding her bike too fast to properly navigate a curve in the sidewalk, and, as a result, rode off of the sidewalk and on to the adjacent ground. She stated that the dirt was "definitely a lower level than the sidewalk" and that her tire dropped "a couple of inches or something like that." She then tried to ride back on to the sidewalk and fell, presumably from her tire hitting the raised edge of the concrete. The cause of Debra's fall was not the act of dropping from the sidewalk to the adjacent ground, but rather the act of attempting to re-enter the sidewalk from that ground while riding the bicycle. Debra's testimony establishes that after she dropped from the concrete, she was aware of the height discrepancy between the adjacent ground and the sidewalk. Her attempt to re-enter the sidewalk was made with the knowledge that there was a raised edge. A reasonable person who dropped from the sidewalk to a lower portion of ground would have recognized the danger of attempting to re-enter the sidewalk in the manner that Debra attempted to re-enter it.

The proper inquiry in analyzing whether special aspects exist so as to make an open and obvious condition unreasonably dangerous is whether the condition was "effectively unavoidable" or created an unreasonable risk of severe harm. *Lugo, supra* at 518. For example, the Supreme Court has said that standing water in a building is effectively unavoidable when it covers the path to the building's only exit. *Id*. And, a 30-foot deep, unguarded pit in the middle of a parking lot creates an unreasonable risk of severe harm. *Id.* Plaintiffs assert that the ground beside the sidewalk was bumpy and Debra therefore had to attempt to re-enter the sidewalk to avoid falling. Debra does not, however, inform this Court why she was unable to simply stop her bicycle, and re-enter the sidewalk on foot, rather than attempt the dangerous maneuver of attempting re-entry while riding the bicycle "too fast" to navigate the sidewalk's contours. Plaintiffs have failed to demonstrate that special aspects exist because they have not shown that that re-entering the sidewalk, especially in the manner that Debra attempted to do so, was effectively unavoidable or that the several inch height disparity created an unreasonable risk of severe harm.

Plaintiffs next assert that the trial court erred in granting Woodland summary disposition on the basis that the dangerous condition was open and obvious. For the reasons discussed above, we disagree, and conclude that summary disposition was properly granted to Woodland.

Plaintiffs also argue that the trial court erred in not granting their motion to amend the complaint to allege a violation of a statutory duty on the part of Woodland. We disagree. A denial of a motion to amend a complaint is reviewed for an abuse of discretion. *Franchino v Franchino*, 263 Mich App 172, 189; 687 NW2d 620 (2004).

On appeal, plaintiffs assert that Woodland violated § 302.3 of the International Property Maintenance Code, which states, "[a]ll sidewalks . . . shall be kept in a proper state of repair and maintained free from hazardous conditions." Plaintiffs contend that § 302.10 of the Michigan Residential Code adopts the International Property Maintenance Code. According to plaintiffs, a violation of the International Property Maintenance Code should thus be treated as a violation of

a statute. And, as the Supreme Court has established, a violation of a statutory duty precludes the assertion of a defense of open and obvious. *Jones v Enertel, Inc*, 467 Mich 266, 269; 650 NW2d 334 (2002).

This Court recently addressed a similar argument in *Kennedy v Great Atlantic & Pacific Tea Co*, 274 Mich App 710; 737 NW2d 179 (2007), in which the plaintiff alleged a violation of the International Property Maintenance Code when he slipped on a crushed grape in the aisle of defendant's supermarket. The Court stated, "we find no support for plaintiff's assertion that a violation of the International Property Maintenance Code is equivalent to a violation of state statute." *Id.* at 719 n 1. The Court explained that while a violation of a code may be evidence of negligence, the proper inquiry remains whether any special aspects made the open and obvious condition unreasonably dangerous. *Id*. at 720. As discussed above, there were no such special aspects present in this case.

An amendment to a complaint is futile, and thus need not be permitted "if it is legally insufficient on its face." *PT Today, Inc v Comm'r of the Office of Financial & Insur Services*, 270 Mich App 110, 143; 715 NW2d 398 (2006). Because a violation of the International Property Maintenance Code does not preclude the assertion of an open and obvious defense, and because plaintiffs failed to establish that special aspects are present, the proposed amendment to the complaint would have been legally insufficient. As such, the trial court did not abuse its discretion in denying plaintiffs' motion.

We affirm.

/s/ Christopher M. Murray
/s/ Richard A. Bandstra
/s/ Karen M. Fort Hood